Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-580

THE COUNTY OF NASSAU,

Petitioner,

—against—

DEWITT OWENS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, COUNTY OF NASSAU, defendant-appellee below, respectfully petitions for a Writ of Certiorari to review the decision of the U.S. Court of Appeals for the Second Circuit, filed July 9, 1979, reversing and remanding the dismissal of the complaint of the respondent DEWITT OWENS, plaintiff-appellant below.

Opinion Below

The Opinion of the Court of Appeals for the Second Circuit dated July 9, 1979 is not yet reported and is reprinted in the attached Appendix at 3a-19a. The Opinion of the District Court dismissing the complaint is reported at 456 F. Supp. 1009

(E.D.N.Y., 1978) and is reprinted in the attached Appendix at 20a-27a.

Jurisdiction

The Judgment of the Court of Appeals was entered on July 9, 1979, and this Petition for Certiorari was filed within 90 days of the latter date. This Court has jurisdiction to review the decision of the Court of Appeals by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1) and in accordance with Supreme Court Rule 19.

Questions Presented

1. Did the U. S. Court of Appeals for the Second Circuit fail to follow the mandate of this Court in *Monell v. New York City Department of Social Services,* 436 U.S. 658 (1978) when it sustained a claim under 42 U.S.C. § 1983 or 42 U.S.C. § 1985 which alleged a single, spontaneous and isolated assault perpetrated against the plaintiff by lower echelon employees of the County who were concededly acting illegally and unofficially, when there was neither the allegation or inference, nor any basis for the same, to suggest that the incident was carried out in the execution of official governmental policy or custom?

2. Did the Court of Appeals for the Second Circuit create a conflict among the Circuits by failing to follow *Monell*?

3. Did the Court of Appeals improperly permit a federal prisoner to invoke the jurisdiction of the federal courts by virtue of his simple third party-

beneficiary suit against a local county for breach of a contract entered into between the County and the United States concerning the confinement of such prisoner in the County's local facility?

Statutes Involved

Section 18 U.S.C. § 4002, provides as follows:

> § 4002. Federal prisoners in State institutions; employment
>
> For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Attorney General may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons.
>
> Such Federal prisoners shall be employed only in the manufacture of articles for, the production of supplies for, the construction of public works for, and the maintenance and care of the institutions of, the State or political subdivision in which they are imprisoned.
>
> The rates to be paid for the care and custody of said persons shall take into consideration the character of the quarters furnished, sanitary conditions, and quality of subsistence and may be such as will permit and encourage the proper authorities to provide reasonably decent, sanitary, and healthful quarters and subsistence for such persons.

The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Klu Klux Klan Act, 42 U.S.C. § 1985 provides, in relevant part, as follows:

> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

28 U.S.C. § 1331, provides in pertinent part:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

Statement of the Case

The plaintiff, DEWITT OWENS, (hereinafter "Owens") was a federal prisoner who was transferred to a Nassau County jail in Hicksville, New York in August, 1976. The transfer was made pursuant to a general agreement between the United States Bureau of Prisons and Nassau County, entered into pursuant to 18 U.S.C. § 4002 under which the federal government may contract to house federal prisoners in county facilities. Owens alleges that while he was so confined, certain county corrections officers, who were named as individual defendants in this action, assaulted him. The facts indicate that the alleged violence was an isolated and spontaneous event.

Shortly after the incident, Owens appeared before U.S. District Judge John R. Bartels of the Eastern District of New York to be sentenced for the offense

that had originally resulted in his incarceration. Judge Bartels thereupon conducted a thorough hearing concerning the circumstances of the incident, during which Owens and several of the corrections officers testified. It emerged that only lower echelon employees of the prison were involved. No official policy or custom of maltreatment of prisoners in the facility was revealed or implicated in the incident. In short, there is nothing to suggest that the alleged assualt on Owens partakes of any sort of official county policy or custom.

Proceedings Below

The District Court

Owens brought an action under 42 U.S.C. §§ 1983 and 1985, as well as directly under the 14th Amendment, alleging violations of his constitutional rights under the 5th, 8th and 14th Amendments. He also claimed third party beneficiary rights under the County's contract with the United States. The County moved for summary judgment on the ground that the plaintiff's complaint failed to state a claim upon which relief may be granted. The Court considered the motion as one for judgment on the pleadings pursuant to F.R.Civ.Pro. 12(c) and dismissed the complaint.

First, the District Court dismissed the plaintiff's §§ 1983 and 1985 claims against the County. The Court acknowledged that the traditionally inflexible immunity to suit against a municipality under § 1983 had been expressly overruled in *Monell v. New York City Department of Social Services,* 436 U.S. 658

(1978). However, relying on the *Monell* court's careful proviso that municipalities still could not be held liable under § 1983 on a *respondeat superior* theory, *Id.* at 692-694, the court dismissed the plaintiff's §§ 1983 and 1985 claims as an erroneous attempt at asserting *respondeat superior* liability, however else the plaintiff may have sought to characterize the nature of his claim. (at 21a-23a).

The District Court also noted that the claims for damages asserted directly under the 14th Amendment could not survive inasmuch as the complaint did not "allege facts from which it could be reasonably inferred that the municipality itself, rather than its workers was the wrongdoer." (at 25a).

The District Court also rejected Owens' attempt to recover based upon the agreement between the United States and the County under which he was housed in the Nassau County jail. The Court held that § 4002 does not itself imply any private right of action and that the contract entered into pursuant to this section contains nothing from which such an analysis might reasonably be inferred.

Accordingly, the District Court granted the County of Nassau's motion to dismiss the complaint in its entirety insofar as it alleged any claims against the County. It is noted, however, that Owens was not, as a consequence of the District Court's dismissal, left altogether remediless. His action against the individual defendants, the alleged assailants, was left intact.

The Court of Appeals

The Court of Appeals for the Second Circuit reversed the judgment of the District Court and remanded the case for further proceedings.

The Court of Appeals remarked that this Court had, in *Monell,* "left open the exact dimensions of the grounds on which a municipality could be held liable." (at 7a). The Court also noted that under *Monell* "a mere failure by the County to supervise its employees would not be sufficient to hold it liable under § 1983". (at 8a). However, the Court postulated that if such failure was so severe as to partake of "gross negligence" or of "deliberate indifference", municipal liability under §§ 1983 and 1985 would lie. (at 8a). Accordingly, the Court of Appeals held that Owens was entitled to conduct discovery in an effort to seek out a conceivable theory that would be sufficient to withstand this Court's insistence that municipal liability should be limited to instances of offficially adopted and promulgated abuse.

Furthermore, the Court of Appeals found that the agreement at issue contained a conceivable basis for third-party contractual liability. (at 11a *et. seq.)* The Court then inquired as to whether such a claim would be a matter of federal law or of state law. It noted that such an analysis must be made to establish "an alternate basis for jurisdiction in the District Court". The Court of Appeals admitted that "the matter is not free from doubt" and then concluded that "it may be that these claims are a matter of federal law." (At 13a). From this cautious premise, the Court resolved its doubt in favor of a finding of

an independent basis for federal jurisdiction, based upon a presumed federal interest in providing for suitable care of federal prisoners.

The Court of Appeals did not treat Owens' contention that he states a claim directly under the 14th Amendment since it recognized that such a damage claim was no longer cognizable in light of *Monell. Turpin v. City of West Haven,* 591 F. 2d 426 at 427 (2d Cir. 1979).

Finally, the Court of Appeals agreed with the District Court that 18 U.S.C. § 4002, under authority of which Owens was housed in the local facility, did not give rise to an implied private right of action.

Reasons for Granting the Writ

I

The Court of Appeals Failed to Adhere to the Principles Enunciated in *Monell* and Other Applicable Decisions of This Court Concerning Municipal Immunity Against Vicarious Liability Under 42 U.S.C. §§ 1983 and 1985.

In *Monell v. New York City Department of Social Services,* 436 U.S. 658 (1978), this Court explicitly held that a local governmental entity may be found liable under § 1983, not on a broad *respondeat superior* basis but only for such infringements of a plaintiff's constitutional rights as are adopted by the governmental entity as official custom or policy. *Id.* at 690. The essence of this holding was vigorously enunciated as follows:

> We conclude . . . that a local government may not be sued for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. *Id.* at 694.

The Court of Appeals has failed to properly apply the lessons of *Monell.* Owens' complaint alleged an isolated unconstititutional event and not a generalized or systematic discriminatory policy. No factual allegation was made, nor indeed can any be envisioned, that would raise this incident to the level of conduct that "implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by the [county's] officers." *Id.* at 690. Cf. *Moore v. Tangipahoa Parish School Board,* 594 F. 2d 489 (5th Cir. 1979). Moreover, Owens does not allege, nor do the facts at hand indicate, that he was victimized by a persistent and widespread pattern of misconduct that may conceivably amount to the deliberate adoption and enforcement of unconstitutional policies. *Id.* at 691.

The Court of Appeals attempted to circumvent the *Monell* doctrine by postulating (at 8a) that a showing of "deliberate indifference" or "gross negligence" on the part of the County, would be sufficient to withstand municipal immunity against *respondeat superior* liability.

The Court (at 8a-9a) quoted from the testimony before Judge Bartels of John Haas, a lower echelon corrections officer who was named as an individual

defendant in this action, to the effect that "a show of force is a good way to control an inmate who refused to obey an order". The Court also noted that Haas had indicated that one of the other guards involved in the incident was "fairly new" on the job. (at 8a). From this bare set of circumstances the Court theorized that the County was somehow "deliberately indifferent" or "grossly negligent" in its hiring, training and supervision policies, and that "Owens should be permitted to conduct limited discovery in order to determine if a case can be made . . ." (at 10a).

In the first instance, there is no basis for the exception which the Second Circuit is seeking to engraft upon the *Monell* rule. The justification for the doctrine of *respondeat superior* is that the master has the opportunity to select, train and control his servants and, accordingly, is in the best position as a loss-avoider. *Kostka v. Hogg,* 560 F. 2d 37 (1st Cir. 1977) at n.3, p.41. The Second Circuit has converted this rationale into the subject matter of a constitutional duty under § 1983. Practically, the Court has, by indirection, articulated a basis for § 1983 liability which this Court had emphatically foreclosed. See, also, *Rizzo v. Goode,* 423 U.S. 362 (1976); *Estelle v. Gamble,* 429 U.S. 97 (1976).

Indeed, it is every *respondeat superior* case that lends itself to speculation that the municipality has manifested "gross negligence" or "deliberate indifference" in the selection, hiring or training of its servants. If this is an exception to this Court's proscription against vicarious municipal liability under § 1983, then the exception has consumed the general

Monell rule and, notwithstanding this Court's admonition to the contrary, there will never be a § 1983 suit against a municipality that will be subject to summary dismissal. Clearly, this court never contemplated that *Monell* would lead to the enactment of such an untenable scenario.

Moreover, based upon groundless speculation that the County of Nassau may be deliberately indifferent to constitutional rights of prisoners, the Second Circuit has now sanctioned a vexatious fishing expedition, which would, presumably open this case to an examination of a host of broad and ill-defined issues that transcend the limited scope of Owens' grievance.

Accordingly, this decision, if not reversed, has the potential for creating havoc in the jurisprudence of civil rights. Every frivolous § 1983 suit would be the occasion for implementation of full-scale discovery in the fond hope that something will be unearthed to fuel speculation on systematic unconstitutional practices. Such an anomaly must not be permitted to develop.

This Court in *Monell* specifically noted that "we have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be. We have attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases and we expressly leave further development of this action to another day". *Id.* at 695. It is submitted that this day has now arrived.

This Court should therefore accept this case for review and reverse the judgment of the Court of Appeals for the Second Circuit.

II

This Court Should Resolve the Conflict That Exists Among the Circuit Courts of Appeal as to the Scope of Municipal Liability Under *Monell*.

The decision of the Court of Appeals for the Second Circuit clearly conflicts with decisions of other courts nationwide on the Court of Appeals and District Court levels.

Thus, in *Molina v. Richardson,* 578 F.2d 846 (9th Cir. 1978), the plaintiff commenced an action under § 1983 against the City of Los Angeles and two Los Angeles police officers. The Court of Appeals held that the district court's dismissal of the plaintiff's claim against the City was proper. The court noted that *Monell* had reaffirmed the well known principle that a municipality cannot be held vicariously liable under § 1983 for the alleged wrongdoing of its officers. The Court then remarked, at 848:

> Molina's complaint sought recovery against the City "by virtue of [the employment] relationship" between the City and the police officers. Although it is conceded that the officers were acting within their official capacities . . . Molina did not argue before the court that the allegedly *illegal* conduct of the officers "may fairly be said to represent [the City's] official policy". Thus

Monell does not give Molina a § 1983 cause of action against the City.

Similarly, in *Reimer v. Short*, 578 F.2d 621 (5th Cir. 1978), the proprietor of an auto salvage business brought suit against, *inter alia*, the City of Houston under 42 U.S.C. §§ 1983 and 1985. The Court of Appeals for the Fifth Circuit held [at 626] that pursuant to *Monell*, the City could not be held liable because it did not act "through its policies, formally or informally adopted, to deprive [plaintiff] of his constitutional rights." The court then noted that "since the only theory under which the City of Houston could be held liable is *respondeat superior*, the action was properly dismissed as to the City". See also, *Russ v. Ratliff*, 578 F.2d 221 (8th Cir. 1978) at 224 n. 7; *Thurston v. Dekle*, 578 F.2d 1167 (5th Cir. 1978) at 1168.

To the same effect is *Sterling v. Village of Maywood*, 579 F.2d 1350 (7th Cir. 1978). In *Sterling* the plaintiff sought monetary relief against a municipality under § 1983 for injuries he suffered when his water service was wrongfully terminated by employees of the municipal water unit who then wrongfully refused to reinstate service even after he offered to make payment. The Court of Appeals rejected § 1983 as an available remedy under the Supreme Court's decision in *Monell*. The Court held that since an allegation concerning a municipal "custom" or "practice" of wrongful conduct was absent, the action must be dismissed. See, also, *Coggins v. Carpenter*, 468 F. Supp. 270 (E.D. Penn., 1979); *Zaragoza v. City of San Antonio, Texas*, 464 F.

Supp. 1163 (W.D. Texas, 1979); *Meyers v. Davis*, 467 F.Supp. 8 (E.D. Tenn., 1978).

These Courts uniformly rejected the opportunity, which the Second Circuit exploited in this case, to extrapolate from the insufficient allegations proffered, to create a new basis for liability predicated on a bare inference of personal responsibility for "deliberate indifference" or "gross negligence" in the hiring, training and supervision of its employees.

In light of this clear conflict among the circuit courts of appeal on the scope of municipal liability under *Monell*, the Court should grant a Writ of Certiorari and resolve the conflict.

III

The Court of Appeals Has Improperly Invoked the Jurisdiction of the Federal Courts Under 28 U.S.C. § 1331.

Owens, seeking to recover under the general agreement between the United States and Nassau County, attached a pendent third-party beneficiary contract claim to his complaint. However, once it is recognized, as it must be, that Owens has no remedy against the County under 42 U.S.C. §§ 1983 and 1985, then his simple contract claim, to which his complaint is then reduced, does not state a federal question pursuant to 28 U.S.C. § 1331 and is subject to dismissal together with his other pendent state law claims against the County. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1965); *Iroquois Industries v. Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969), *cert. denied*, 390 U.S. 909 (1970).

Recognizing this, the Court of Appeals held (at 13a) that the present contractual relationship must be subjected to federal jurisdiction. This reasoning is erroneous.

In *Wallis v. Pan American Petroleum Corporation,* 348 U.S. 63 (1969), this Court observed that:

> [I]n deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be shown. *Id.* at 68.

If there is no significant threat to any identifiable federal policy or interest, then clearly there is no occasion to fashion federal common law. *Bank of American National Trust and Savings Assoc. v. Parnell,* 352 U.S. 29 (1956).

In the present case, this pre-requisite for the application of federal common law is not met. It is true that the Court invoked a federal interest in this action but it nevertheless resorted to *New York law* in its substantive analysis concerning Owens' third-party beneficiary status. Implicitly, therefore, the Second Circuit conceded that there is no necessity for uniformity to dispel any potential for uncertainty by the application of disparate state rules. Accordingly, whatever the linkage may be between the outcome of the present case and some federal interest, there "has been no showing that state law is not adequate to achieve it". *Wallis v. Pan American Petroleum Corp., supra* at 71. Hence, any argument concerning the desirability of uniformity fails to

justify or require federal jurisdiction. See, e.g., *Brookhaven Housing Coalition v. Joel Solomon,* 583 F.2d 584 (2d Cir. 1978) at 590 n.11.

Moreover, as far as the United States government is concerned, "the present litigation is purely between private parties and does not touch the rights and duties of the United States". *Bank of America v. Parnell, supra* at 33. Accordingly, the plaintiff's claim does not occasion resort to federal jurisdiction. *Bank of America v. Parnell, supra.*

Insofar as the Court of Appeals postulated a federal interest based on the duty of the United States to care adequately for its prisoners, it appears to have minimized the significance of this Court's holding in *Logue v. United States,* 412 U.S. 521 (1973).

In *Logue,* this Court noted that 18 U.S.C. § 4002, the enabling statute for the present contract, contemplates that day to day operations of the state prison facility which houses a federal prisoner are to be in the hands of the state contractor and that the federal role must be severely circumscribed. Thus, the Court held that a § 4002 federal-county agreement reflects a division of responsibility so pronounced as to immunize the federal government, in such a situation, from a claim by the prisoner pursuant to the Federal Tort Claims Act [28 U.S.C. § 2671] *Logue v. United States, supra.* See, also, *Winston v. United States,* 305 F.2d 253 (2d Cir. 1962) at 269, *affirmed* 374 U.S. 150 (1963). Accordingly, federal jurisdiction predicated on some presumed federal interest in the present circumstances must fail.

Moreover, the fact that the present contract was executed pursuant to authority vested by congressional enactment does not require the displacement of state law. As this Court recognized in *Wallis v. Pan American Petroleum Corp., supra* at 68:

> . . . Even where there is related federal legislation in an area, as is true in this instance, it must be remembered that "Congress acts . . . against the background of the total *corpus juris* of the states. . . ." Hart & Wechsler, *The Federal Courts and the Federal System* 435 (1953) . . .

Moreover, the Second Circuit's decisions appears to be in conflict with *Miree v. DeKalb County, Georgia, et al.*, 433 U.S. 25 (1977) wherein this Court held that the question of whether a private party may, as third-party beneficiary, sue a municipality for breach of a government contract between a local county and the United States, is a matter of state law and not federal common law. In *Miree,* diversity jurisdiction was present and, accordingly, the action was cognizable by a federal court even after federal common law was displaced by this Court in favor of state law. In the present case, however, the only jurisdictional peg on which the plaintiff's pendent contract claim could hang, was no longer present and summary dismissal of the entire complaint was mandated. See *Aldinger v. Howard,* 427 U.S. 1 (1976).

At a time when the ambit of federal jurisdiction is already being conceived of as excessive, unworkable and unnecessary [See, e.g. Sheran & Issaacman, *State Cases Belong in State Courts,* 12 Creighton L. Rev.

26-69 (1978); Friendly, *Federal Jurisdiction: A General View* 139-52] the Court of Appeals has erroneously resolved its doubts[1] concerning the federal character of this simple contract claim of a private litigant in favor of expanding the ambit of federal jurisdiction. Under the circumstances, this Court should accept the case for review and resolve the important questions presented thereby.

CONCLUSION

For the reasons stated, petitioner respectfully urges this Court to grant the Writ of Certiorari and accept this case for review.

Respectfully submitted,

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Dated: October 9, 1979

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[1] The Court of Appeals expressed itself as follows (at 13a):
"While *The matter is not free from doubt, it may be* that the contract here sufficiently implicates federal interests so that interpretation of rights and duties under the agreement should be governed by federal law. [emphasis added].

APPENDIX

Judgment Of The Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

79-7043

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of July one thousand nine hundred and seventy-nine.

Present:

HON. IRVING R. KAUFMAN, *Chief Judge*
HON. J. JOSEPH SMITH, *Circuit Judge*
HON. LLOYD F. MACMAHON, *District Judge*

DEWITT OWENS,

Plaintiff-Appellant,

—v.—

JOHN HAAS, ALONZO QUARLES, PETER SKALKOS, JAMES J. BRITT, WILLIAM R. KESSLER, JOSEPH CHATOWSKI, MICHAEL ALLEN, WALTER J. FLOOD,

Defendants,

and

THE COUNTY OF NASSAU,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A. DANIEL FUSARO,
Clerk

by

(Sgd.) ARTHUR HELLER,
Deputy Clerk

Opinion Of The Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 825—August Term, 1978.

(Argued April 16, 1979 Decided July 9, 1979.)

Docket No. 79-7043

DEWITT OWENS,

Plaintiff-Appellant,

—v.—

JOHN HAAS, ALONZO QUARLES, PETER SKALKOS, JAMES J. BRITT, WILLIAM R. KESSLER, JOSEPH CHATOWSKI, MICHAEL ALLEN, WALTER J. FLOOD,

Defendants,

and

THE COUNTY OF NASSAU,

Defendant-Appellee.

Before:

KAUFMAN, *Chief Judge,* SMITH, *Circuit Judge,*
and MACMAHON, *District Judge.* *

* Honorable Lloyd F. MacMahon, United States District Judge for the Southern District of New York, sitting by designation.

Appeal from a dismissal of civil action based on claims against the County of Nassau for violations of the Civil Rights Act and for breach of contract, in the United States District Court for the Eastern District of New York, George C. Pratt, *Judge*. Decision reported at 456 F. Supp. 1009 (1978). Reversed and remanded.

STEVEN E. HARBOUR, New York, N.Y. Philip K. Howard, New York, N.Y., of counsel, *for Appellant*.

ABRAHAM S. ALTHEIM (Newman & Schlau, P.C., New York, N.Y.), *for Appellee*.

SMITH, *Circuit Judge:*

This appeal from the dismissal of a civil action against the County of Nassau, one of several defendants, comes to us following a direction for judgment under Fed. R. Civ. P. 54(b). Plaintiff Owens sued corrections officers and the county for violation of his civil rights under 42 U.S.C. §§ 1983 and 1985, and for breach of contract as a third party beneficiary. Judge Pratt found that Owens had failed to state a claim against the county under Fed. R. Civ. P. 12(c), and dismissed the action. 456 F. Supp. 1009 (E.D.N.Y. 1978). We reverse and remand for further proceedings.

Plaintiff Owens was a federal prisoner who was cooperating with the United States Government. In order to insure his safety, he was transferred from federal prison to the Nassau County Jail in Hicksville, New York in August, 1976. This transfer was pursuant to a contract

between the U.S. Bureau of Prisons and Nassau County, authorized by 18 U.S.C. § 4002.[1]

The incident at issue took place on October 27, 1976. According to plaintiff, he was asleep in his cell when he was visited by a guard and told to report to the court desk downstairs to acknowledge the lodging of a warrant against him. Plaintiff Owens refused to leave his cell to sign for the warrant, protesting that "There shouldn't be another warrant out for me. I already signed for a warrant. . . ." Owens apparently believed that there was no requirement that he sign if he did not wish to do so.

Owens related that the first guard left, and sometime thereafter, First Class Corrections Officer Haas came to his cell. When Owens again refused to leave his cell, the two men argued, and Haas told Owens to "pack [his] stuff up," indicating that Owens would be taken to a more secure locked cell on a different floor. Insults were exchanged when Owens refused to leave; then Officer Haas left.

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1 18 U.S.C. § 4002 provided:

> For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Director of the Bureau of Prisons may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistance, care, and proper employment of such persons.
>
> Such Federal prisoners shall be employed only in the manufacture of articles for, the production of supplies for, the construction of public works for, and the maintenance and care of the institutions of, the State or political subdivision in which they are imprisoned.
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> The rates to be paid for the care and custody of said persons shall take into consideration the character of the quarters furnished, sanitary conditions, and quality of subsistence and may be such as will permit and encourage the proper authorities to provide reasonably decent, sanitary, and healthful quarters and subsistence for such persons.

This section was amended on November 9, 1978, to authorize the Attorney General, rather than the Bureau of Prisons, to contract with local authorities.

Fifteen or twenty minutes later, several officers returned to Owens' cell and ordered him to leave. An argument ensued, and Owens stepped out of his cell. Approximately seven guards were present. Owens was grabbed and beaten severely by the prison officials, resulting in lacerations, bruises, and lasting impairments which cause him to suffer blackouts to the present time.

Owens appeared before U.S. District Judge John R. Bartels of the Eastern District of New York for sentencing in an unrelated case shortly after the incident. Judge Bartels noticed that Owens was badly injured, and questioned him about the injuries. Judge Bartels then ordered a hearing on the circumstances of the incident resulting in the injuries, at which Owens and several of the prison officials testified.

Owens filed this damage suit in April, 1977, alleging violations of his constitutional rights under 42 U.S.C. § 1983 and § 1985 and claiming damages for breach of contract as a third party beneficiary of the contract between the Bureau of Prisons and Nassau County, under 18 U.S.C. § 4002 and general contract principles. Judge Pratt rejected the § 1983 claim against the county because no official policy or pattern of constitutional violations had been pleaded so as to hold the county liable under the court's reading of *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1978). Judge Pratt also found that Owens could not claim he was a third party beneficiary of the contract, and no private right of action existed under 18 U.S.C. § 4002. Consequently, the court dismissed the action against the county. We reverse and remand.

Section 1983 Claim

When Owens filed his complaint in 1977, municipalities could not be held liable for constitutional violations,

under the immunity established as to such bodies in *Monroe v. Pape,* 365 U.S. 167 (1961). This general immunity was removed from local bodies when the Supreme Court in *Monell* overruled *Monroe v. Pape* and held that municipalities are "persons" within the meaning of 42 U.S.C. § 1983.[2]

The Court in *Monell* left open the exact dimensions of the grounds on which a municipality could be held liable. It is clear that

> a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory. [*Monell, supra* at 691.]

Therefore, municipalities could only be liable for "action pursuant to official municipal policy of some nature [that] caused a constitutional tort." *Id.,* at 691.

The trial court read this language as requiring that a violent incident such as the one here be part of an official policy or custom, or be one in a series of incidents of which the county is aware, for the county to be held liable for the beating of this federal prisoner. Since no such causal link was pleaded, the district court concluded

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2 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Though *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1978), held specifically that a municipality was a "person" for purposes of § 1983, counties and other "local government units" come within the holding. *Id.,* at 690 & n. 54.

that there was no basis for county liability. We believe that this reading of *Monell* was too narrow, and that plaintiff Owens should have been given the opportunity, after limited discovery, to amend his complaint to state a ground for holding the county liable here.

The district court was correct in noting that a mere failure by the county to supervise its employees would not be sufficient to hold it liable under § 1983. *Rizzo v. Goode,* 423 U.S. 362 (1976). However, the county could be held liable if the failure to supervise or the lack of a proper training program was so severe as to reach the level of "gross negligence" or "deliberate indifference" to the deprivation of the plaintiff's constitutional rights. *Leite v. City of Providence,* 463 F. Supp. 585, 590-91 (D.R.I. 1978); *see also Hampton v. Holmesburg Prison Officials,* 546 F.2d 1077, 1081-82 (3d Cir. 1976). This concept of "deliberate indifference" does not hold the county at fault for the actions of its employees on a *respondeat superior* basis; it holds the county liable for its *own* actions which result in deprivation of constitutional rights. *See Turpin v. Mailet,* 579 F.2d 152, 164-65 & n. 37 (2d Cir. 1978), *vacated,* 99 S.Ct. 554, 47 U.S.L.W. 3368 (Nov. 27, 1978), *modified,* 591 F.2d 426 (2d Cir. 1979); *DiMarzo v. Cahill,* 575 F.2d 15, 18 (1st Cir. 1978), *cert. denied,* 99 S.Ct. 564 (1978), 47 U.S.L.W. 3301 (Oct. 20, 1978).

There is some indication in this case that a claim by Owens of failure to train or deliberate indifference of the county to violations of constitutional rights could be raised. In testimony before Judge Bartels, Officer Haas mentioned that one of the other guards involved in the incident, Officer Allen, was "fairly new" on the job. Haas also noted his philosophy that "a show of force" involving the presence of several officers is a good way to control

an inmate who refused to obey an order. That an officer who is new to his job might not be properly prepared, and that a "show of force" might get out of hand in the absence of proper training, could be inferred from this testimony. The brutal and premeditated nature of the beating in this case and the number and rank of officers involved warrant the allowance of limited discovery so that the plaintiff may attempt to substantiate a claim of "deliberate indifference" by the county to the violence of prison officials, stemming from a failure to train the guards in an adequate manner.

The district court rejected liability for the county, in part, because plaintiff "asserts here not a repeated course of conduct, but only an isolated incident." *Owens v. Haas,* 456 F. Supp. 1009, 1012 (E.D.N.Y. 1978). While some causal link must be made between the county's failure to train and the violation of constitutional rights, a single brutal incident such as this may be sufficient to suggest that link. As noted in *Leite, supra,* 463 F. Supp. at 590-91:

> Although a city cannot be held liable for simple negligent training of its police force, the city's citizens do not have to endure a "pattern" of past police misconduct before they can sue the city under section 1983. . . . [A] municipality is fairly considered to have actual or imputed knowledge of the almost inevitable consequences that arise from the nonexistent or grossly inadequate training and supervising of a police force.

It is true that the failure to train or supervise law enforcement officers must be so grossly negligent as to constitute "deliberate indifference" in order to hold the county liable. As mentioned, though, the circumstances of

this severe beating are such as to suggest official acquiescence on some level. In this case, then, Owens should be permitted to conduct limited discovery in order to determine if a case can be made for deliberate indifference by the county. Allowance of limited discovery and amendment of the complaint in this case is an appropriate way to balance the concern against entertaining groundless suits against municipalities, *see Smith v. Ambrogio,* 456 F. Supp. 1130 (D.Conn. 1978), with the dictates of *Escalera v. New York City Housing Authority,* 425 F.2d 853, 857 (2d Cir.), *cert. denied,* 400 U.S. 853 (1970):

> An action, especially under the Civil Rights Act, should not be dismissed at the pleading stage unless it appears to a certainty that plaintiffs are entitled to no relief under any state of the facts, which could be proved in support of their claims. [Citations omitted.]

Section 1985 Claim

Since under *Monell,* a local body is a "person" for the purposes of § 1983, we assume that the same definition of "person" would apply to § 1985, which allows damages whenever two or more "persons" conspire to violate the civil rights of another. Again the county could not be held liable on a *respondeat superior* theory. However, if Owens' amended complaint alleges an official custom or policy of the county, relating to failure to train or to other matters stemming from or resulting in a conspiracy implicating the county itself, a § 1985 claim will lie. *See Heimbach v. Village of Lyons,* ____ F.2d ____, slip op. 2387 (2d Cir., April 26, 1979).

Breach of Contract Claims

Plaintiff Owens claims he was a beneficiary of the contract between the U.S. Bureau of Prisons and the County of Nassau, which called for Nassau County to house and care for federal prisoners in its jail, entered into pursuant to 18 U.S.C. § 4002.

Owens argues first that he has an implied private right of action under 18 U.S.C. § 4002. This statute authorizes the United States to contract with local authorities "for the imprisonment, subsistence, care, and proper employment" of federal prisoners. Owens contends that since the statute lists its purpose as "providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress," he is intended to be benefited by the statute, and thus may sue for injury to him under its implied authority.

We agree with the court below that an implied private right of action under § 4002 will not lie. In order to imply a private right of action under a statute which does not explicitly provide for such, certain standards must be met. *See generally, Davis v. Passman,* ____ U.S. ____, 47 U.S.L.W. 4643, 4646 (June 5, 1979). According to *Cort v. Ash;* 422 U.S. 66, 78 (1975), the court must look to (a) whether plaintiff is "one of the class for whose especial benefit the statute was enacted," (b) whether the legislative history shows any intent to deny or to grant a private remedy, (c) whether implying a private remedy would be consistent with the underlying legislative scheme and (d) whether the cause of action is one traditionally relegated to state law. In this case, these standards have not been met.

While prisoners themselves benefit from the scheme of the federal statutes dealing with prisons, there is insufficient support for a finding that the *statutes* were enacted

especially for the benefit of prisoners. The underlying legislative scheme is aimed at providing suitable quarters for prisoners, but also at creating a workable administrative network for the operation of federal prisons. The Attorney General is given ultimate control over the prisons in 18 U.S.C. § 4001, and the language and history of § 4002 show no specific intention to grant a private right of action to prisoners. Thus, we cannot find an implied right of action under 18 U.S.C. § 4002 which could be utilized by Owens. *See Hampton v. Holmesburg Prison Officials, supra,* 546 F.2d at 1082; *Williams v. United States,* 405 F.2d 951, 954 (9th Cir. 1969); *Johnson v. Lark,* 365 F. Supp. 289, 301 (E.D. Mo. 1973).

Next, Owens claims a right to collect damages for breach of contract as a third party beneficiary of the contract between the United States and Nassau County, not specifically through an implied right of action under § 4002, but under general principles of contract law as they relate to this particular contract. In order to determine the validity of this claim, Judge Pratt issued an order requiring the parties to submit a copy of the contract at issue. Upon examination, Judge Pratt found no basis for holding that Owens enjoyed status as a third party beneficiary, and rejected his claim on this ground. Our reading of the contract[3] suggests that Owens might be able to enforce the contract as a third party benefi-

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3 The contract which appears in the record of this case is dated May 25, 1978. The policy statement which is incorporated into the contract is dated October 1, 1977. Since Owens was injured in October, 1976, and his complaint filed in April, 1977, the contract provided to Judge Pratt by the County of Nassau cannot be the specific contract at issue in Owens' claim. We assume that the fact that the county submitted the 1978 contract in response to Judge Pratt's order indicates a representation by the county that the earlier contract was identical, and we proceed on that basis.

ciary, and we remand for further consideration of this claim.

The first question is whether these claims are a matter of federal law or of state law. The question is posed both as a guide to contract interpretation and as an alternate basis for jurisdiction in the district court. If federal law applies to the contract claim, then Owens will have a jurisdictional basis for bringing such a claim in federal district court under 28 U.S.C. § 1331, even if his § 1983 claim, discussed above, fails. If, however, the issues are ones purely of state law, there would be no basis for jurisdiction in the federal courts, absent a valid federal claim. *See Hampton v. Holmesburg Prison Officials, supra,* 546 F.2d at 1082. While the matter is not free from doubt, it may be that the contract here sufficiently implicates federal interests so that interpretation of rights and duties under the agreement should be governed by federal law. *See Bank of America National Trust and Savings Association v. Parnell,* 352 U.S. 29, 34 (1956); *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943); *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.,* 391 F.2d 486, 491-93 (2d Cir. 1968). *See also, Illinois v. City of Milwaukee,* 406 U.S. 91, 100 (1972).

Though state law will be applied to an agreement which involves private parties and does not bring into play rights or duties of the federal government, *Miree v. DeKalb County,* 433 U.S. 25, 28-29 (1977); *Parnell, supra,* 352 U.S. at 33, "federal common law" will be applied by a court when there is some overriding federal interest at stake. This interest could be implicated when litigation is such that "substantial rights and duties of the United States hinge on its outcome," *Miree, supra,* 433 U.S. at 31, when the scale of the federal activities in an area is so vast that "the desirability of a uniform rule is plain,"

Clearfield Trust, supra, 318 U.S. at 367, or if "the congressional purpose [of a statutory scheme] can be achieved only if a uniform federal law governs," *Ivy Broadcasting Co., supra,* 391 F.2d at 491. We recognize that the question of whether federal common law or state law applies to agreements involving obligations of the federal government is often a close one. *See Miree, supra* (Burger, *C.J.,* concurring). Still, in this case there is a sufficient governmental interest in the treatment of federal prisoners to make it desirable that interpretations of rights under federal contracts relating to that area be governed by federal law.

To begin with, the federal government owes a duty of reasonable care to safeguard the security of prisoners under its control.[4] *See United States v. Muniz,* 374 U.S. 150, 164-65 (1963); *Jones v. United States,* 534 F.2d 53, 54 (5th Cir.), *cert. denied,* 429 U.S. 978 (1976); *Cohen v. United States,* 252 F. Supp. 679, 687 (N.D. Ga. 1966), *rev'd in part on other grounds,* 389 F.2d 689 (5th Cir. 1967). This duty stems from both the statutory scheme, specifically 18 U.S.C. § 4042,[5] and from general duties im-

4 *But see* note 7 *infra.*

5 18 U.S.C. § 4042 provides:

> The Bureau of Prisons, under the direction of the Attorney General, shall—
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> (1) have charge of the management and regulation of all Federal penal and correctional institutions;
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> (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
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> (3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States;
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> (4) provide technical assistance to State and local government in the improvement of their correctional systems.
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> This section shall not apply to military or naval penal or correctional institutions or the persons confined therein.

posed by the Constitution. *See generally, Wolff v. McDonnell,* 418 U.S. 539, 555-56 (1974); *Burgin v. Henderson,* 536 F.2d 501, 502 (2d Cir. 1976). *See also, Hernandez v. Lattimore,* ____ F.2d ____, slip op. 2885 (2d Cir., June 7, 1979).

In addition, the scheme of regulation of federal prisons indicates a congressional intent to provide some general protections for federal prisoners. 18 U.S.C. § 4001 gives the Attorney General supervisory authority over federal prisoners, including authority to "provide for their proper government, discipline, treatment, care, rehabilitation, and reformation." Also, the purpose of § 4002, giving the United States authority to contract with local bodies for the care of federal prisoners, is to provide "suitable quarters for the safekeeping, care, and subsistence" of all prisoners. In this regard, rates to be paid to local authorities may be such "as will permit and encourage the proper authorities to provide reasonably decent, sanitary, and healthful quarters and subsistence" for federal inmates. This federal involvement in encouraging proper treatment of federal prisoners is further evidenced by the policy statement and regulations which are incorporated into the contracts between the United States and local bodies,[6] aimed at assuring that

> [f]ederal prisoners shall be placed in contract facilities which provide a secure, humane and orderly environment, and in which adequate attention is given to the maintenance of each inmate's health, safety, and general welfare.

Thus, there are several reasons for applying federal law to questions of general rights under federal/county contracts relating to federal prisoners, such as the one here. Because there is a federal regulatory scheme, there is a

6 *See* note 9 for specific examples.

federal interest in assuring uniform treatment of federal prisoners. *Ivy Broadcasting, supra,* 391 F.2d at 490-91. And since the United States has a duty to care adequately for its prisoners, *Muniz, supra,* and is liable for its own negligence in that regard,[7] federal rights and obligations do "hinge on the outcome" of litigation in this area. *See Miree, supra,* 433 U.S. at 31.

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7 In *Logue v. United States*, 412 U.S. 521 (1973), the Supreme Court ruled that the United States was not liable under the Federal Tort Claims Act for the negligence of county jail officials with whom it had contracted pursuant to 18 U.S.C. § 4002. This holding was based on a finding that the county was a "contractor" who was specifically exempted from the provisions of the Federal Tort Claims Act. But even under that case, the federal government is still liable for its own negligence. *Id.*, at 532-33. Presumably, then, though the United States could not be held liable for the negligence of local officials with whom it had contracted, the federal government could be held liable for its own actions if it could be found to have been negligent in contracting with a local authority.

Also, in *United States v. Muniz*, 374 U.S. 150, 161-62 (1963), the Court notes that the uncertainty of subjecting the United States to the variations of state tort law was not sufficient reason to deny recovery to prisoners claiming injury from negligence of federal employees under the Federal Tort Claims Act. This does not mean, however, that there is not a significant federal interest involved in the contracting of the United States with local authorities for the care of federal prisoners.

First, the duties of the federal government in such contracting are not just those related to day-to-day operations of a caretaker, as discussed in *Muniz*; they are more closely tied to federal policy concerned with oversight of prison administration and general care of federal prisoners. Second, in *Muniz* the Court had to decide whether the variations of tort law from state to state were so great as to deny any recovery at all to a federal prisoner because of those variations, and decided to the contrary:

> [T]hough the Government expresses some concern that the nonuniform right to recover [embodied in the FTCA reference to state law] will prejudice prisoners, it nonetheless seems clear that no recovery would prejudice them even more. [*Id.*, at 162.]

Here, where it is not necessary to deal with that precise question, it is possible to recognize a federal interest in regulation of federal prisoners sufficient to ground federal jurisdiction.

The fact that the rights and obligations of the contract may be interpreted by reference to federal law does not mean, however, that New York law may not be consulted. "In our choice of the applicable federal rule we have occasionally selected state law." *Clearfield Trust, supra,* 318 U.S. at 367. Thus, the federal court may, if desirable, look to New York state law in this case to determine whether Owens is a third party beneficiary under the contract between the United States and Nassau County.[8]

Under New York law, there must be some intention that a third party benefit from an agreement before that party can sue under that contract. *Lawrence v. Fox,* 20 N.Y. 268 (1859). While such a beneficiary must derive more than merely incidental benefit from the contract, *see Port Chester Electrical Construction Co. v. Atlas,* 40 N.Y.2d 652, 655 (1976), an intention to benefit a third party may be gleaned from the contract as a whole and the party need not be named specifically as a beneficiary. *Newin Corp. v. Hartford Accident & Indemnity Co.,* 37 N.Y.2d 211, 219 (1975).

Our reading of the contract in the record in this case indicates that Owens, as a federal prisoner, was intended to benefit from the agreement between the United States and Nassau County. The Policy Statement of the Bureau of Prisons, incorporated into the contract, includes numerous clauses which provide for the safekeeping and protection of federal prisoners. These provisions, set out in the margin,[9] suggest that a federal prisoner who was injured

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8 *See Miree v. DeKalb County,* 433 U.S. 25, 30 (1977).

9 The contract summary of services to be provided calls for provision for "safekeeping, care and subsistence of persons held under authority of any United States statute."

The policy statement attached to and incorporated into the contract states the policy that "Federal prisoners shall be placed

in a county jail, could claim status as an intended beneficiary of the contract.

Owens' claim as an intended beneficiary is buttressed by the fact that the United States owes him some duty of protection. *Muniz, supra; Jones, supra.* Though the United States cannot be held liable for the negligence of the county under *Logue v. United States,* 412 U.S. 521 (1973),[10] it still can be held liable for its own negligence, *Muniz,* and this duty exists before the United States contracts with local authorities to take the prisoners. Therefore, it would appear likely that the prisoners can claim third party beneficiary status as ones to whom a duty is owed, *compare United States v. Ogden Technology Laboratories, Inc.,* 406 F. Supp. 1090, 1092 (E.D.N.Y. 1973).

While this reading of the contract is, of course, subject to further exploration of the provisions of the contract in effect at the time Owens was injured,[11] and further elaboration of New York law on the subject, we feel that Owens does state what may be a valid claim as a benefi-

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in contract facilities which provide a secure, humane and orderly environment, and in which adquate attention is given to the maintenance of each inmate's health, safety, and general welfare."

Chapter 1.1.6. provides: "Supervision in matters of sanitation and safety must be continuous."

Chapter 1.7. provides: "Federal offenders shall not be subject to corporal punishment or other cruel and inhumane treatment. . . . Where it is necessary to use force with an offender, only the minimum force required to gain control of the situation and to prevent injury should be used."

Chapter 1.7.2.1. provides: "Offenders who have violated institution rules and regulations or who become unmanageable in a facility or program may be subjected to disciplinary action in accordance with the institution [sic] local procedures, provided that these procedures are in accord with the U.S. Supreme Court decision in *Wolff v. McDonnell.*" [418 U.S. 539 (1974).]

10 *See* note 7, *supra.*

11 *See* note 3, *supra.*

ciary of the contract which should not have been dismissed.

Since Owens should have been allowed limited discovery and opportunity to amend his complaint to plead facts to support a legitimate § 1983 claim, and since he states what may be a valid contract claim, the case is reversed and remanded for further proceedings consistent with this opinion.

Memorandum and Order of the District Court

GEORGE C. PRATT, District Judge:

By motion submitted on July 20, 1978, defendant County of Nassau seeks an order granting summary judgment dismissing the complaint against it. Although the motion is captioned as one for summary judgment, the county has not filed a statement of undisputed facts pursuant to EDNY Rule 9(g), stating that it is inapplicable to this motion. Therefore, the court will consider the motion as one for judgment on the pleadings pursuant to FRCP 12(c).

According to the complaint, plaintiff is a federal prisoner who, on August 8, 1976, was transferred from federal custody to the Nassau County jail in Hicksville for the purpose of insuring his safety. The transfer was made under a general agreement between the United States and Nassau County entered into pursuant to 18 U.S.C. § 4002, under which the federal government for a fee may house federal prisoners in county facilities. The complaint alleges that on October 27, 1976, the individual corrections officers named as defendants herein inflicted serious physical injuries on the plaintiff, by "choking him and beating him with their fists about the head and body", thereby rendering him unconscious. Complaint, ¶ 15.

Seeking compensatory damages, punitive damages, and attorney's fees, plaintiff sues under 42 U.S.C. §§ 1983 & 1985, as well as directly under the fourteenth amendment, alleging violations of constitutional rights under the fifth, eighth, and fourteenth amendments. Plaintiff also claims third party beneficiary rights under the county's contract with the

United States, and further asserts pendent claims of liability under state law.

The county seeks dismissal, claiming that as a municipal corporation it cannot be held responsible in this court for the alleged acts of the individual defendants.

§ 1983 CLAIM

Until recently, indeed, even when this motion was originally made, political subdivisions of a state were not considered "persons" subject to suit under § 1983. *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *Moor v. County of Alameda,* 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973). On June 6, 1978, however, the Supreme Court expressly overruled *Monroe v. Pape, supra,* and its progeny, insofar as they had held that a local government was not a "person" suable under § 1983. *Monell v. New York City Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). But the shield against municipal liability was only partially lifted. In *Monell,* the court specifically stated that:

> [l]ocal governing bodies * * * can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where * * * the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, * * * local governments * * * may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.
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> On the other hand, * * * Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tort feasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory. *Id.*, 98 S.Ct. at 2035-36 (emphasis in original)

Under *Monell's* new reading of § 1983, therefore, the governmental entity may be liable for its employees' acts, but only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury * * *." *Id.*, 98 S.Ct. at 2038.

In an earlier case, *Rizzo v. Goode,* 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), the Supreme Court denied injunctive relief against city officials on a § 1983 claim involving actions of the city's police officers. The Second Circuit recently commented on that case:

> The plaintiffs * * * did not demonstrate that the random actions of the police officers were part of a concerted plan or pursuant to any departmental policy—express or otherwise. This failure to prove any "causal link" between individual incidents and the behavior of those in authority was fatal to their claim. [We are] permitting municipal liability only where the governmental entity authorizes, sanctions, or ratifies the actions of its employees * * *. *Turpin v. Mailet,* 579 F.2d 152 at 167 (CA2 1978).

Plaintiff urges that under *Monell,* a municipality's mere failure to supervise its employees would provide a basis for imposing liability, see *Monell v. Dept. of Social Services, supra,* 98 S.Ct. at 2037 n.58; *Rizzo v. Goode, supra,* 423 U.S. at 370-71, 96 S.Ct. 598, reasoning that the county's failure to maintain an adequate prison-guard training program produces guards of the type who allegedly assaulted the plaintiff. Such a theory, however, is one step removed from the situations envisioned by *Monell.* Plaintiff asserts here not a repeated course of conduct, but only an isolated incident. He does not allege that the county was aware of any past violent propensities of the defendant corrections officers, nor does he attribute any custom or policy to the county. In short, on the pleadings before the court, there is simply no "causal link" to connect the assault on plaintiff with any sort of official county policy or custom.

Finally, in *Monell* the Supreme Court reaffirmed *Monroe v. Pape, supra,* "insofar as it holds that the doctrine of *respondeat superior* is not a basis for rendering municipalities liable under § 1983 for the constitutional torts of their employees." 98 S.Ct. at 2022 n.7. To the extent that the complaint suggests liability under § 1983 predicated on *respondeat superior,* it therefore errs. Despite *Monell,* then, plaintiff's action against the county, insofar as it is based on § 1983, must be dismissed.

§ 1985 Claim

Plaintiff also seeks to hold the county liable under 42 U.S.C. § 1985. Prior to *Monell,* a § 1985 damage claim could not be maintained against a municipality because the latter was not a "person". *See Bosely v.*

City of Euclid, 496 F.2d 193 (CA6 1974); *see also Weathers v. W. Yuma County School District,* 387 F.Supp. 552 (D.Colo. 1974); *Potts v. Wright,* 357 F. Supp. 215 (E.D.Pa. 1973). Now, however, the Supreme Court's current reading of legislative history to classify a municipal corporation as a "person" under § 1983 presumably is equally applicable to § 1985, each of whose subdivisions proscribes conduct by "two or more persons".

Assuming without deciding that a municipal corporation is a "person" capable of entering into a conspiracy in violation of § 1985, it is nevertheless clear that plaintiff here has alleged no such conspiracy. As under § 1983, liability of a municipality for conspiracy to violate plaintiff's civil rights must derive from more than conspiratorial conduct by a low level employee. Necessarily, it must reflect an officially adopted policy or custom of the municipality. Since plaintiff here has alleged no facts which would implicate a municipal policy or custom of conspiring to violate plaintiff's rights, his claim under 42 U.S.C. § 1985 must be dismissed.

FOURTEENTH AMENDMENT CLAIM

Plaintiff also seeks to keep the county in the action under the Second Circuit's recent decision in *Turpin v. Mailet,* 579 F.2d 152 (CA2 1978), upholding a damage claim asserted against a municipal corporation directly under the fourteenth amendment. In his concurring opinion in *Monell,* Mr. Justice Powell indicated that one of the considerations moving him to overrule the Supreme Court's in-

terpretation of the statutory term "person" established in *Monroe v. Pape,* was the difficulty presented by the Supreme Court's decision in *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) in which a cause of action for damages had been implied directly from the fourth amendment. According to Justice Powell, he would rather overrule *Monroe* "than constitutionalize a cause of action against local government that Congress intended to create in 1871". *Monell, supra,* 98 S.Ct. at 2047. At least one Supreme Court Justice, therefore, resists the concept of a damage claim against a municipality directly under the fourteenth amendment.

Nevertheless, one day before the *Monell* decision, the Second Circuit in *Turpin* expressly upheld such a direct claim. In doing so, however, the Second Circuit imposed limitations on the scope of such a claim which are similar to those established by the Supreme Court in *Monell* for a claim under § 1983. According to the Second Circuit, a claim against a municipality directly under the fourteenth amendment would not lie under the doctrine of *respondeat superior, Turpin v. Mailet, supra,* at 165, would be limited "to those instances in which the municipality itself is a wrongdoer", *id.* at 168, and would arise only when the unconstitutional actions of the municipal employees are "authorized, sanctioned, or ratified by municipal officials or bodies functioning at a policy-making level". *Id.* at 164.

Plaintiff's complaint does not allege facts from which it could be reasonably inferred that the municipality itself, rather than its workers, was the wrongdoer; there are no allegations that the employees'

allegedly unconstitutional actions were authorized, sanctioned, or ratified by any official functioning at a policy-making level; accordingly, plaintiff's complaint against the County of Nassau insofar as it lies directly under the fourteenth amendment must be dismissed.

Plaintiff's Breach of Contract Claim

In his fourth cause of action, plaintiff seeks to recover based upon the agreement between the United States and the County of Nassau entered into pursuant to 18 U.S.C. § 4002, under which he was housed as a federal prisoner in the Nassau County jail. Plaintiff argues that under the agreement the county assumed custody of the plaintiff, and that it impliedly agreed to protect his health and safety, that by the actions of its employees the county breached the agreement, and that the county is therefore liable to plaintiff as a third-party beneficiary.

18 U.S.C. § 4002 provides in relevant part:

> For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Director of the Bureau of Prisons may contract * * * with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons.

Section 4002 does not itself imply any private right of action. *Hampton v. Holmesberg Prison Officials,* 546 F.2d 1077, 1082 (CA3 1976); *Johnson v. Lark,* 365 F.Supp. 289, 300-01 (E.D.Mo. 1973). Plaintiff urges, however, that the contract entered into pursuant to this section creates rights which give him status as a third-party beneficiary. In order to properly consider that claim, this court by memorandum and order dated August 3, 1978 directed counsel for the County of Nassau to supply a copy of the contract, both to the court and to plaintiff's attorney. The county's attorney complied, and after reviewing the contract, the court can find no provisions from which plaintiff's third-party beneficiary claim might reasonably be inferred, whether the analysis is based on federal common law or New York State contract law. Accordingly, plaintiff has alleged no claim against the County of Nassau either under 18 U.S.C. § 4002 or under the agreement between the County of Nassau and the United States entered into pursuant to that section.

Pendent Claims

Since plaintiff has no basis for a federal claim against defendant County of Nassau, his pendent state law claims against the county must also be dismissed.

Conclusion

Defendant County of Nassau's motion to dismiss the complaint in its entirety insofar as it alleges any claims against the County of Nassau is granted.

So Ordered

Dated: Westbury, New York
September 11, 1978.

/s/ George C. Pratt
George C. Pratt
U. S. District Judge

Supreme Court, U. S.
FILED
NOV 8 1979
MICHAEL RODAK, JR., CLERK

No. 79-580

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE COUNTY OF NASSAU,

Petitioner,

—*v.*—

DEWITT OWENS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STEVEN E. HARBOUR,
Of Counsel.

November 8, 1979

IN THE

Supreme Court of the United States

October Term, 1979

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—*v.*—

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Petitioner County of Nassau presents this case as an unfortunate but isolated act of brutality. What plaintiff Dewitt Owens alleged, however, was a premeditated and systematic beating in the supposedly controlled environment of the Nassau County Jail by 7 officers and supervisors, including the lieutenant and sergeant in charge of the platoon of correctional officers (6a; A3, 21-30, 49).[1] It is undisputed that plaintiff never struck any correctional officer, yet the beating continued, with racial epithets, even after plaintiff—bones broken and head lacerated—later had been dragged unconscious to an office downstairs (*id.*; A100-01). All of this occurred because plaintiff refused to sign a document which he knew he did not have to sign (5a).

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[1] "A—" references are to the record before the court of appeals; "—a" references are to the appendix attached to petitioner's brief.

The extraordinary lawlessness of this institution—where the entire platoon of correctional officers assembled, marched up to locked cell, unlocked the door and then pummelled a prisoner—occurred despite the special obligation Nassau County had undertaken to protect this particular prisoner. The County had contracted with the federal government to safekeep plaintiff, a cooperating federal prisoner, and had promised, *inter alia,* that he would "not be subject to corporal punishment or other cruel or inhumane treatment" (4a-5a; A153).

The district court dismissed the complaint on the ground that plaintiff—who had been allowed no discovery—had not pointed to any official policy of the County to brutalize prisoners, but had alleged only the facts which he knew (25a-26a; see 23a).

The court of appeals reversed, principally on the ground that a municipality can be liable for a deprivation of civil rights where it is culpable under traditional tort principles, specifically where its conduct is "so severe as to reach the level of 'gross negligence' or 'deliberate indifference' to the deprivation of plaintiff's constitutional rights" (8a).

ARGUMENT

I.

The decision below is not ripe for review.

The decision of the court of appeals requires only that plaintiff be allowed discovery and have an opportunity to prove his case. Until such time as the facts are fully developed, and any award against the County is actually sustained by the court of appeals, the County's disagreement with the court of appeals' formulation is not ripe for review.

II.

The court of appeals applied traditional principles and defined the scope of municipal liability precisely as was done at common law and in analogous actions under the civil rights laws.

The County of Nassau persists, as in the court below, in asserting that plaintiff seeks to hold it liable "solely . . . on a respondeat superior theory" (Pet. 9-12), a theory precluded by *Monell* v. *New York City Dep't of Social Services,* 436 U.S. 658, 691 (1978) and, earlier, by the Second Circuit. *E.g., Turpin* v. *Mailet,* 579 F.2d 152, 160-67 (2d Cir. 1978) (*en banc*). The cases petitioner cites as conflicting with the decision below all involve such claims (Pet. 13-15).

Plaintiff, however, seeks to hold the County of Nassau liable not under a *respondeat superior* theory, but under traditional tort principles for its own culpability, *i.e.,* "for the natural consequences of [its] actions," *Monroe* v. *Pape,* 365 U.S. 167, 187 (1961); *see Monell,* 436 U.S. at 700-01; *Turpin* v. *Mailet,* 579 F.2d at 165-67. Under common law, a municipality found to be grossly negligent or deliberately indifferent to prisoners' welfare is liable for their mistreatment. *Fernelius* v. *Pierce,* 138 P.2d 12, 14-17 (Cal. Sup. Ct. 1943); *Meistinsky* v. *City of New York,* 309 N.Y. 998 (1956). Supervisory officials have been held liable under § 1983 in the same circumstances, *see Turpin* v. *Mailet,* 579 F.2d at 167; *Wright* v. *McMann,* 460 F.2d 126, 134-35 (2d Cir.), *cert. denied,* 409 U.S. 885 (1972); *Carter* v. *Carlson,* 447 F.2d 358, 365 (D.C. Cir. 1971), *rev'd on other grounds,* 409 U.S. 418 (1973); *Whirl* v. *Kern,* 407 F.2d 781, 787-89 (5th Cir. 1968), *cert. denied,* 396 U.S. 901 (1969). *See also Byrd* v. *Briske,* 466 F.2d 206, 210 (7th Cir. 1972).

Monell did not cast doubt upon the wisdom of this established body of law, but reaffirmed it by carefully excluding only those claims brought "*solely* . . . on a respondeat superior theory." 436 U.S. at 691 (emphasis in original). *Monell's* references to "policy" and "custom," 436 U.S. at 691, are nowhere defined only as legislative acts or pronouncements, and could not be so limited without rendering meaningless *Monell's* fundamental holding that municipalities may be liable where they are responsible for the deprivation of civil rights. Local officials will rarely be so stupid as to express publicly any *de facto* policy of, or deliberate indifference to, discrimination or deprivation of civil rights. *See id.* at 694 n.58.

Further, there is a special need for such causes of action in the controlled environment of correctional institutions. In a prison—unlike normal police activity—there is a unique ability to control and isolate any potential problems without need to resort to the type of violence present here, and there is also a unique ability for the institution—its activities confined within four walls—to exercise control over its employees. A correctional institution also differs from the street situation in its isolation from the scrutiny and criticism of society. In this peculiar environment, the County is in complete control and free from ordinary social oversight. If it hires supervisors and officers with violent tendencies, or does not have sufficient training or controls even to prevent mass premeditated beatings at the hands of its chosen employees, it should be liable for deprivation of plaintiff's civil rights as surely as are its seven officers and supervisors who ganged together to beat plaintiff to unconsciousness.

In allowing plaintiff an opportunity to have discovery and to prove its case, the court of appeals did no more nor less than faithfully apply *Monell* to the particular facts of this case.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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STEVEN E. HARBOUR,

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November 8, 1979